Filed 6/5/03 P. v. Hunt CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY CHARLES HUNT, Defendant and Appellant.	E031733 (Super.Ct.No. FSB 032507) OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry J.T. Carlton and Gary W. Brozio, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Timothy Charles Hunt (defendant) of

criminal threats[1] and misdemeanor assault.[2] The trial court found true that defendant had two strike prior allegations.[3] The trial court sentenced defendant to 25 years to life in state prison for the criminal threats and 180 days in county jail for the assault.

On appeal, defendant contends (1) the trial court erred in failing to instruct the jury on self-defense, (2) the trial court erred in instructing the jury with CALJIC No. 17.41.1, (3) the court abused its discretion in denying defendant's motion to dismiss one of his strike priors, and (4) defendant's sentence is disproportionate to the crimes committed and thus constitutes cruel and unusual punishment under the federal Constitution. We find no reversible error and affirm the judgment.

1. Factual Background

During the evening of November 3, 2001, defendant and his girlfriend, Sandra Sarick, began arguing. They had been drinking alcohol throughout the day. Sarick wanted to leave defendant's apartment. Defendant wanted her to stay. They then started fighting over a pint of vodka. Defendant grabbed the bottle and threw it away. Sarick threw a bag of sugar toward the door.

According to Sarick's trial testimony, defendant then knocked Sarick to the floor, put his legs on each side of Sarick's stomach and squeezed her. He also put one of his

---

[1] Penal Code section 422. Unless otherwise noted, all statutory references are to the Penal Code.

[2] Section 245, subdivision (a)(1).

[3] Section 667, subdivisions (b) - (I).

[footnote continued on next page]

hands around her chin and the other behind her head and twisted her head. Meanwhile, defendant told her four or five times, "I'll kill you, bitch, I'll kill you." He also told her he would snap her neck and no one would know. After a couple minutes he let her go. Sarick got up and ran out the door. As she fled, defendant threw an unopened can of beer at the back of Sarick's head and knocked her down in the front yard.

Defendant then sat on Sarick's back and began punching her three or four times in the back of her head. Sarick began screaming. When defendant covered her mouth with his hand, she bit his thumb. Defendant got off Sarick's back and left.

Sheriff's Deputy Kevin Snyder testified that when he arrived at the scene, Sarick was sitting against a fence on the side of the street, screaming and crying. Her nose was bleeding. She had marks under her eyes and her arms were bruised. Sarick told Snyder she had had a fight with defendant during which a beer can hit the back of her head. Sarick and Snyder could not find the beer can.

While the police were looking for defendant, defendant called Sarick's friend, Mona Carpena. Carpena testified defendant told her he had hurt Sarick but was sorry. He also said he had Sarick's address book and threatened that if Sarick said anything about the incident, he would hurt someone; impliedly Sarick's family and friends.

After the manager of defendant's apartment notified the sheriff's department defendant had returned to his apartment, Snyder entered defendant's apartment, found him hiding under a bed, and arrested him.

[footnote continued from previous page]

2. Self-Defense Instruction

Defendant contends the trial court violated his Fifth and Fourteenth Amendment rights under the federal Constitution by denying his request to instruct the jury on self-defense. The trial court concluded there was insufficient evidence justifying such instruction. The People argue defendant does not have a federal constitutional right to instruction on self-defense. Regardless of whether there is such a right, the trial court did not abuse its discretion in finding there was insufficient evidence to support such an instruction.

A trial court must instruct on the law applicable to the case. "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."[4] A defendant is entitled to an instruction that pinpoints the theory of the defense. However, the trial court must only give instructions which are supported by substantial evidence and may properly refuse requested defense instructions on any theory which is not supported by the evidence.[5] Thus, the issue presented here is whether there was substantial evidence of self-defense.

Here, defendant claims there was substantial evidence of self-defense based on testimony by Sarick, Varela, and Tyndall that Sarick bit and kicked defendant. Sarick

---

[4] *Mathews v. U.S.* (1988) 485 U.S. 58, 63, citing *Stevenson v. United States* (1896) 162 U.S. 313; see also *People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 157.

[5] *People v. Marshall* (1997) 15 Cal.4th 1, 39-40.

[footnote continued on next page]

testified she bit defendant's thumb when he was hitting her in the back of the head and had his hand over her mouth to muffle her screams. Sarick stated that other than biting defendant, she did not strike or injure defendant, although she may have scratched him while he was pinning her to the ground and twisting her head.

Sarick acknowledged she threw a bag of sugar at the front door when she and defendant began arguing over the vodka bottle. She did not throw the bag at defendant. She also acknowledged that a couple weeks after the incident she wrote defendant a letter stating that the assault incident was her fault because drinking vodka was her idea and she had upset him by breaking pictures of his daughter. She felt she should have left him alone. Sarick acknowledged she had received a black belt in Karate when she was 13, about 18 years prior to the subject crimes. Sarick also said she had not remained active in Karate.

Defendant also relies on Alfred Varela's testimony. Varela testified he did not see the incident but afterwards Sarick told Varela and his wife, Karen Tyndall, that Sarick had been in a fight with defendant. Defendant had thrown a beer can at her because she was going to take the car and go party. She also bragged she used her martial arts skills, drew defendant's blood, and hurt defendant more than he hurt her. She said she bit defendant and kicked him with a roundhouse kick. Varela also heard Sarick laughing as she told his wife "she pretty much whipped on him." Varela acknowledged he had convictions for child molestation, a couple burglaries, and petty theft.

[footnote continued from previous page]

Tyndall testified the only thing she remembered hearing about the incident was Sarick bragging she had bitten and hit defendant. Tyndall could not remember if Sarick told her the night of the incident or the next day. She did not remember when she saw Sarick. Tyndall acknowledged she was a paranoid schizophrenic on medication for her condition and had problems with her memory.

The trial court did not abuse its discretion in concluding that the above testimony was insufficient evidence to support instruction on self-defense. There was absolutely no evidence that Sarick threatened defendant with great bodily injury or death. Had defendant truly felt that his safety was in danger, defendant could have fled. Also, there was no evidence that Sarick had any type of weapon or made any threatening movements towards defendant. Rather, there was overwhelming evidence that defendant was the aggressor. Even Varela and Tyndall's testimony does not establish defendant was defending himself when Sarick bit him and allegedly kicked him. Furthermore, the evidence showed that Sarick sustained numerous physical injuries whereas defendant sustained none. The trial court thus did not err in rejecting defendant's request for self-defense instructions. "It is not error to refuse a request for instructions on self-defense when there is no evidence from which it can be inferred that the defendant feared great bodily harm or death at the hands of the victim . . . ."[6]

---

[6] *People v. Sedeno* (1974) 10 Cal.3d 703, 718, disapproved on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, footnote 12; *People v. Breverman, supra,* 19 Cal.4th at pages 148-149; and *People v. Blakeley* (2000) 23 Cal.4th 82, 89.

Moreover, even if there was such instructional error, it was harmless under any standard. Given the extremely strong evidence defendant was the aggressor, no reasonable trier of fact would have found defendant acted in self-defense had instruction on self-defense been given.[7]

3. CALJIC No. 17.41.1

Defendant contends the trial court erred in instructing the jury with CALJIC No. 17.41.1. Specifically, he argues it violates his right to a fair trial, it threatens the privacy and impartiality of jury deliberations, it impinges on his right to a unanimous verdict, and it has a chilling effect on the jurors.

We reject defendant's contentions. Substantially similar and related arguments were considered and rejected by our Supreme Court in *People v. Engelman*.[8] Accordingly, we reject defendant's constitutional challenges.

We observe, however, that the Supreme Court, exercising its supervisory powers, directed that the instruction not be given in future trials.[9] It reasoned that the instruction creates an inadvisable and unnecessary risk "of intrusion upon the secrecy of deliberations or of an adverse impact on the course of deliberations."[10] But here, as in

---

[7] *Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818.

[8] *People v. Engelman* (2002) 28 Cal.4th 436, 442-445.

[9] *People v. Engelman, supra,* 28 Cal.4th at page 449.

[10] *People v. Engelman, supra,* 28 Cal.4th at page 445.

[footnote continued on next page]

Engelman, there is no indication that CALJIC No. 17.41.1 affected the jurors' deliberations in any way. Thus, defendant has not shown that the instruction violated his constitutional rights in any of the claimed respects. The trial court did not commit reversible error by giving CALJIC No. 17.41.1.

4. *Romero*[11] Motion to Dismiss a Prior Strike

Defendant complains that the trial court abused its discretion in denying his motion to dismiss at least one of his strike priors. Defendant argues that imposing a life sentence was unwarranted in light of the nature of the current offense, the fact that defendant's prior conviction resulted from a single period of aberrant behavior, and the court could have imposed a lengthy determinate sentence rather than a life sentence. We disagree. There was no abuse of discretion in denying defendant's *Romero* motion.

Rulings on *Romero* motions are reviewed for abuse of discretion.[12] Discretion is abused where the trial court's decision is "irrational or arbitrary."[13] Discretion is also abused when the trial court's decision to strike or not to strike a prior is based on improper reasons[14] or the decision is not in conformity with the "spirit" of the law.[15]

[footnote continued from previous page]

[11] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

[12] *People v. Myers* (1999) 69 Cal.App.4th 305, 309.

[13] *People v. Myers, supra,* 69 Cal.App.4th at page 310.

[14] *Romero, supra,* 13 Cal.4th at page 531; *People v. Benevides* (1998) 64 Cal.App.4th 728, 735, footnote 6.

[footnote continued on next page]

"It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. [Citation.]"[16] Once the trial court has exercised its discretion and does not strike a prior conviction, this court's role on appeal is very limited. Thus, it would be a rare case in which the trial court could abuse its discretion in declining to strike a prior conviction of a recidivist offender.

The touchstone of the analysis must be "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies."[17]

[footnote continued from previous page]

[15] *People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Myers, supra,* 69 Cal.App.4th at page 310.

[16] *People v. Myers, supra,* 69 Cal.App.4th at page 310.

[17] *People v. Williams, supra,* 17 Cal.4th at page 161; see also *People v. Garcia* (1999) 20 Cal.4th 490, 498- 499.

Defendant argues that since the jury did not convict him of corporal injury or assault by means likely to cause great bodily injury, his convictions were of a minor and non-aggravated nature. The jury convicted defendant of criminal threats, a felony, and the lesser included offense of misdemeanor assault. The court declared a mistrial as to the corporal injury count. Defendant also argues his two 1993 child molestation convictions arose from a single case.

But defendant's criminal history is lengthy and extensive. Prior to the charged offenses, defendant committed crimes in 1976, 1978, 1979, 1986, and 1992, including violent and heinous felonies for robbery, grand theft, assault, and child molestation. Despite being placed on probation and spending time in prison, defendant has continued to violate the law. His most recent offenses also involve acts of violence and criminal threats. Defendant's current convictions are based on allegations defendant physically attacked Sarick and threw a can of beer at her head, knocking her to the ground.

Even though the jury did not convict defendant of committing corporal injury and great bodily injury, the evidence established defendant's violent acts and threats were of a very serious nature, as are defendant's past crimes. Although defendant has been convicted of fewer crimes during the past two decades than in the 1970's, he has continued to commit very serious offenses, indicating he still presents a serious risk to the public. Under such circumstances the trial court did not abuse its discretion in refusing to dismiss any of defendant's prior strikes.

5. Cruel and Unusual Punishment

Defendant also asserts that his sentence violates the cruel and unusual punishment proscription under the Eighth and Fourteenth Amendments of the United States Constitution.

In *Ewing v. California*,[18] the United States Supreme Court recently rejected this contention and upheld California's three strikes law. The court held the Eighth Amendment did not prohibit a three strikes law sentence of 25 years to life for a defendant who shoplifted golf clubs worth about $1,200 and committed three residential burglaries and one first degree robbery seven years before the charged offense. A majority of the court concluded either that the Eighth Amendment contains only a "narrow" proportionality principle that prohibits sentences that are grossly disproportionate (Chief Justice Rehnquist and Justices O'Connor and Kennedy) or it contains no proportionality principle at all (Justices Scalia and Thomas). In *Lockyer v. Andrade*,[19] a companion case to *Ewing*, the United States Supreme Court recently reached a similar holding.

Applying these standards, we find no disproportionality and reject defendant's cruel and unusual punishment contention based on the United States Supreme Court recent decisions holding that the three strikes law does not violate the proscription on cruel and unusual punishment. The three strikes law was designed precisely for people

---

[18] *Ewing v. California* (2003) ___ U.S. ___, 123 S.Ct. 1179, 1185, 1190.

like defendant whose convictions are for serious offenses and who have a history of convictions for serious and violent crimes.

6. Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.

[footnote continued from previous page]

19 *Lockyer v. Andrade* (2003) ___ U. S. ___, 123 S.Ct. 1166.